Date	Filings—Proceedings
1972	
Feb. 9	Order (Seitz, Chief Judge and Van Dusen, Aldisert, *Adams*, Gibbons and Rosenn, Circuit Judges and Whipple, District Judge), denying petition for rehearing, filed.
Feb. 17	Certified judgment in lieu of formal mandate issued.

[Caption Omitted]

COMPLAINT

I

Plaintiff, W. Willard Wirtz, Secretary of Labor, United States Department of Labor, brings this action to enjoin defendant from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.* Section references herein are to the Act as amended by the Fair Labor Standards Act Amendments of 1961, 75 Stat. 65, and not as amended by the Fair Labor Standards Act Amendments of 1966, 80 Stat. 830), hereinafter referred to as the Act, including the restraint of any withholding of minimum wage and overtime compensation found by the Court to be due to the employees of the defendant.

II

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

Defendant Arnheim and Neely, Inc., is, and all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at the Grant Building, Pittsburgh, Allegheny County, Commonwealth of Pennsylvania, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was,

engaged at that place of business and at other buildings in the Pittsburgh area, in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities.

IV

That the business activities of Arnheim and Neely, Inc., as described herein, were, and are, related and performed through unified operation and common control for a common business purpose, and constitute an enterprise within the meaning of Section 3(r) of the Act.

V

The total annual gross volume of sales of the enterprise referred to and described in the preceding paragraph is not less than one million dollars ($1,000,000). Defendant's establishments have, and at all times hereinafter mentioned have had, employees engaged in commerce and/or in the production of goods for commerce, and the said enterprise is an enterprise engaged in commerce and/or in the production of goods for commerce, within the meaning of Section 3(s)(3) of the Act

VI

At all times hereinafter mentioned, the defendant has employed, and is employing, several employees in and about its enterprise engaged in real estate management, and the said employees have been, and are, subject to the requirements of the Act applicable to employees engaged in such an enterprise, as defined in Sections 3(r) and 3(s)(3) of the Act, as amended by the Fair Labor Standards Act Amendments of

1961 at 75 Stat. 65. Additionally, the said employees have been since February 1, 1967, and are, subject to the requirements of the Act applicable to employees engaged in such an enterprise as defined in Sections 3(r) and 3(s)(1) of the Act, as amended by the Fair Labor Standards Act Amendments of 1966, 80 Stat. 830.

VII

At all times hereinafter mentioned, the defendant also employed several employees regularly and recurrently engaged in operating passenger elevators carrying mailmen and parcel post deliverymen, delivering mail and other goods continuing in channels of interstate commerce, regularly and recurrently operating freight elevators handling goods continuing in interstate commerce from shipment points outside the Commonwealth of Pennsylvania or being shipped outside the Commonwealth of Pennsylvania, and at all times relevant hereto said employees were engaged in interstate commerce or in the production of goods for interstate commerce, within the meaning of the Act.

VIII

Defendant repeatedly has violated, and is violating, the provisions of Sections 6(b)(1) and 15(a)(2) of the Act by paying several of its employees mentioned in Paragraph VI above for their employment, wages at rates less than those prescribed in Section 6(b)(1) of the Act, since the workweek ending January 4, 1964.

IX

Defendant repeatedly has violated, and is violating, the provisions of Sections 6(a)(1) and 15(a)

(2) of the Act by paying to several of its employees mentioned in Paragraph VII above, for their employment, wages at rates less than those prescribed by Section 6(a)(1) of the Act, since the workweek ending January 4, 1964.

X

Defendant repeatedly has violated, and is violating, the provisions of Sections 7(a)(2) and 15(a)(2) of the Act by employing employees mentioned in Paragraph VI above for workweeks longer than as prescribed in Section 7(a)(2) of the Act, without compensating these employees for employment in excess of the prescribed hours at a rate not less than one and one-half (1½) times the regular rate at which they were employed, since the workweek ending January 4, 1964.

XI

Defendant repeatedly has violated, and is violating, the provisions of Sections 8(a)(1) and 15(a)(2) of the Act by employing several of its employees, mentioned in Paragraph VII above, for workweeks longer than forty (40) hours, in workweeks during such period, at rates not less than one and one-half (1½) times the regular rate at which they are employed, since the workweek ending January 4, 1967.

XII

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of

persons employed, and of the wages, hours, and other conditions and practices of employment, to be made, kept, and preserved by every employer subject to the provisions of the Act. The said regulations, and amendments thereto, were published in the Federal Register and may be found at 29 CFR 516.

XIII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated, and is violating, the provisions of Sections 11(c) and 15(a)(5) of the Act in that since the workweek ending January 4, 1964, it has failed to make, keep, and preserve adequate and accurate records of its employees, and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by the defendant have failed to show, adequately and accurately, among other things, the correct number of hours worked each workday and each workweek by several of its employees.

XIV

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

WHEREFORE, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the

provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and for such other and further relief as may be necessary and appropriate, including the restraint of unlawful withholding of minimum wage and overtime underpayments found by the Court to be due employees of the defendant.

CHARLES DONAHUE
Solicitor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
Deputy Regional Attorney
United States Department
of Labor

GUSTAVE DIAMOND
United States Attorney
Attorneys for Plaintiff

[Filed Oct. 5, 1967]

[Caption Omitted]

ANSWER

I.

The allegations of paragraph I are admitted.

I.

The allegation of paragraph II is admitted.

III.

The allegations of paragraph III are admitted.

IV.

The allegations contained in paragraph IV of the Complaint are denied in their entirety. In further answer thereto, defendant alleges that it manages numerous buildings as agent for various owners, each owner having no relation to any other owner, and having no common business purpose. Defendant is not the owner of any of said buildings.

V.

The allegations contained in paragraph V of the Complaint are denied in their entirety. In further answer thereto, defendant alleges that the total gross volume of defendant is measured by the total commissions received on rentals, and not on gross rentals received as agent for the owners. Total commissions received are substantially less than $1,000,000 annually. Defendant further denies that there exist any establishments as defined by the Fair Labor Standards Act of 1938, as amended, and further de-

nies that it is an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of said Act.

VI.

The allegations contained in paragraph VI are denied in their entirety. In further answer thereto, defendant alleges that any employees employed outside of the office of defendant are employees of the owners of the various buildings, and not employees of defendant.

VII.

The allegations contained in paragraph VII are denied in their entirety. In further answer thereto, defendant alleges that elevator operators employed in the various buildings managed by defendant are employees of the owners of the buildings, and are not the employees of defendant. Defendant further denies that said elevator operators are engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act.

VIII.

The allegations contained in paragraph VIII state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

IX.

The allegations contained in paragraph IX state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

X.

The allegations contained in paragraph X state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

XI.

The allegations contained in paragraph XI state conclusions of law, for which no answer is necessary, but which, nevertheless, are specifically denied.

XII.

The allegations of paragraph XII are admitted.

XIII.

The allegations of paragraph XIII are denied in their entirety. In further answer thereto, defendant alleges that it is not subject to the provisions of said Act, and, therefore, not subject to the record keeping required by the Act.

XIV.

Defendant denies that it has repeatedly violated the provisions of the Act.

WHEREFORE, defendant avers that the Complaint should be dismissed.

E. B. STRASSBURGER
Strassburger & McKenna
Attorneys for Defendant

[Filed Oct. 20, 1967]

[Caption Omitted]

ANSWER OF INTERVENER

First Defense

1. The Institute of Real Estate Management of the National Association of Real Estate Boards (hereinafter referred to as "Intervener") admits the averments contained in Paragraphs II and III of the Complaint.

2. Intervener admits the averments contained in Paragraph I of the complaint to the extent they represent that Plaintiff has brought an action against Defendant under the Fair Labor Standards Act of 1938, as amended. Intervener denies any allegations (or inferences arising therefrom) contained in Paragraph I of the complaint which represent that Defendant is in any way covered by or subject to the Fair Labor Standards Act of 1938, as amended.

3. The averments contained in Paragraph XII of the complaint are conclusions of law to which no answer is required.

4. Intervener specifically denies each and every other allegation and conclusion contained in the complaint.

Second Defense

5. Plaintiff's complaint fails to state a claim against Defendant upon which relief can be granted.

Third Defense

6. Plaintiff has failed to join as indispensable parties under Rule 19 the true employers of the em-

ployees mentioned in Paragraphs I, V, VI, VII, VIII, IX, X, XI, and XIII of the complaint.

WHEREFORE, Intervener denies that Plaintiff is entitled to the relief sought, or any portions thereof, and demands judgment dismissing this action, with costs.

FRANK L. SEAMANS
WM. ALVAH STEWART, III
Eckert, Seamans & Cherin
Attorneys for The Institute of Real Estate Management of the National Association of Real Estate Boards, Intervener

[Filed Jan. 17, 1968]

[Caption Omitted]

STIPULATION

I

The pleadings tender the following issues:

1. Are the business activities of Arnheim and Neely, Inc., hereinafter interchangeably referred to as the defendant, particularly those related to the management of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, as amended; 29 U.S.C. 201, *et seq.*), hereinafter referred to as the Act?

2. Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant "employees" of the defendant within the meaning of the Act?

3. If there is liability under the Act to any of the employees of any of the buildings managed but not owned by Arnheim and Neely, Inc., is it the liability of the defendant or is it the liability of the owner of the buildings?

4. Among the persons noted in the preceding question employed at the various buildings managed by the defendant, are there at each building at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?

5. Does Arnheim and Neely, Inc., employ anywhere two or more persons performing activities

which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?

6. In determining "annual gross volume of sales made or business done" by the defendant within the meaning of Section 3(a) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?

7. Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?

8. After February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(1) of the Act as amended?

II

The parties hereto, for the purpose of this case only, hereby stipulate and agree to the following facts subject to the right of either party to challenge the relevancy or materiality of any of such facts and to introduce additional evidence not inconsistent herewith:

201. The defendant, Arnheim and Neely, Inc., is a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal office and place of business at the Grant Building, Pittsburgh, Allegheny County, Commonwealth of Pennsylvania, within the jurisdiction of this court.

202. The intervenor defendant, The Institute of Real Estate Management of the National Associa-

tion of Real Estate Board, is an Illinois corporation with its principal office located in Chicago, Illinois, having approximately 1,650 members who are engaged in the management of real property in 342 different cities in the United States, involving the management of approximately 5,000 apartment buildings and approximately 2,500 office buildings throughout the United States.

208. Arnheim and Neely, Inc. has for several years engaged in the City of Pittsburgh in the following business activities as reflected in their annual, audited financial statements:

a) Commercial rentals of real property;
b) Commercial sales of real property;
c) Sales of fire insurance and other insurance relating to personal property and the use and occupancy of real property;
d) Real estate consultation and appraisals;
e) Residential property rentals;
f) Residential property sales.

204. Arnheim and Neely, Inc. managed, since January 1, 1968, and currently manages, *inter alia*, the following buildings within the Greater Pittsburgh area, except as noted below:

a) Buhl Building (for the Buhl Foundation, Pittsburgh, Pa.);
b) Clark Building (for 701 Liberty Avenue Realty Co., New York, New York, and also for another owner);
c) Eureka Savings Building (formerly for the Estate of Joseph Simon, et al, Pittsburgh, Pa. and currently for The University of Pittsburgh);
d) Keenan Building (for Walter Green and

Frank Calcar, Washington, D.C., for the period ending February 1, 1968);

e) Martin Building (for Martin Building, Inc., Pittsburgh, Pa.);

f) Pittsburgh Life Building (for F. W. Woolworth Co., New York, New York, beginning in September, 1964);

g) 319 Fifth Avenue (for F. W. Woolworth Co., New York, New York, beginning in September, 1964);

h) Pittsburgh Terminal Properties (for Pittsburgh Terminal Properties Corp., Pittsburgh, Pa., beginning in approximately September, 1964);

i) University Square Apartments (for University Square No. 1, Inc., Pittsburgh, Pa.).

205. The rental income collected by the defendant from the aforestated buildings during the calendar year 1964 was as follows:

Buhl Building	$ 93,537.62
Clark Building	800,902.10
Eureka Savings Building	71,873.24
Keenan Building	176,653.72
Martin Building	117,948.45
Pittsburg Terminal Properties	285,225.57
University Square No. 1	277,343.02
Pittsburgh Life Building	54,207.00*
Building 319 Fifth Avenue	57,190.00*
	$1,935,485.72

* Management commenced September 1964; rental income estimated.

206. That during the calendar years 1964, 1965, 1966 and 1967, and at all times subsequent thereto to present, the annual gross rental income collected by

Arnheim and Neely, Inc. from the above properties and/or those similarly situated, exceeded and now exceeds $1,000,000 per annum.

207. That in the years 1964 and 1965, the commissions received by the defendant from the activities aforementioned in paragraphs 202 and 203 approximated or exceeded $200,000, in the years 1966 and 1967, and at all times subsequent thereto to present approximated or exceeded $250,000, but at no time exceeded $500,000. Receipts from commissions on the sales of real property for others (and from sales of real property in their own name (approximated $62,000, $58,000, $90,000, and $68,000, during said years; commissions on the sales of insurance approximated $11,000, $16,000, $14,000, and $13,000, during said years. Commission rates on real property sales ranged from three per cent (3%) to ten per cent. (10%).

208. None of the buildings managed by Arnheim and Neely, Inc. are owned by it, with the exception that the defendant owns 50 shares out of 2850 shares in Pittsburgh Terminal Properties Corp. (the owner of the Pittsburgh Terminal Properties Building managed by the defendant).

209. That the management of the above properties by Arnheim and Neely, Inc. was conducted pursuant to and under the standard "Contract for Management" attached hereto as Exhibit 1, or one similar thereto, entered into between Arnhim and Neely, Inc. and the owners of the individual buildings.

210. All the activities of defendant Arnheim and Neely, Inc. as specified in the preceding paragraphs 203 through 209, and performed by the approximately 14 employees on the payroll of the defendant as noted

in paragraph 304(a) hereof, are related and performed through unified operation and common control and for a common business purpose by Arnheim and Neely, Inc. The parties are in disagreement as to whether the activities performed by other employees at the buildings managed by the defendant for separate owners are related activities performed through unified operation and common control and for a common business purpose.

311. Defendant stipulates and agrees that a number of employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania.

III

301. Pursuant to the "Contract for Management" (Exhibit 1), the defendant conducts the management operations of the named buildings in the following manners:

a) All receipts collected by Arnheim and Neely, Inc. are deposited in separate accounts for each owner, which accounts are entitled, for example, "Arnheim and Neely, Inc., Buhl Building Account".

b) The funds deposited in these accounts are the property of the owner and not of Arnheim and

Neely, Inc., and Arnheim and Neely, Inc. is not liable in the event of bankruptcy or failure of the depository.

c) Expenses of a particular building, including payroll, equipment purchases, maintenance and repairs, utilities, janitorial supplies, insurance, management fees, and sometimes taxes, are paid out of the account established for the particular building by checks drawn and signed by a representative of Arnheim and Neely, Inc., as agent for the owner. Some expenses such as real estate taxes, major capital expenditures, mortgage payments and insurance premium payments are paid directly by some owners from their separate bank account with which Arnheim and Neely, Inc. has no connection.

d) All Social Security, tax and other governmental reports are signed in the name of the owner of the building by Arnheim and Neely, Inc. as agent.

e) Fees due Arnheim and Neely, Inc. for management and for securing leases are paid to Arnheim and Neely, Inc. from the appropriate account for the building in question by checks drawn and signed by officers of defendant Arnheim and Neely, Inc.

f) Periodically, generally at the end of each month, the balance of funds in each building account is returned to the owner by a check on the account drawn and signed by a representative of Arnheim and Neely, Inc. as agent.

g) Each building owner has separate employer's identification numbers for federal, state, and city payroll taxes. Separate payroll tax returns are prepared by Arnheim and Neely, Inc. and are filed in the name of each building owner individually under his identification number. The taxes are paid from the appropriate account by checks drawn and signed by

representatives of Arnheim and Neely, Inc., as agent. However, in a few instances, the individual owners prepare and file their own tax reports. In such cases, no payment would be made by Arnheim and Neely, Inc. from the appropriate account.

h) Separate income tax returns are prepared and filed by the owners of each building managed by Arnheim and Neely, Inc., which income tax returns reflect the business of the particular owner and not the income of Arnheim and Neely, Inc., except that the management commissions and leasing commissions paid to Arnheim and Neely, Inc. are deducted, with other expenses, from the owner's gross receipts to determine the owner's net income.

i) The rentals of the various tenants in the various buildings managed by Arnheim and Neely, Inc. were either established by a prior management or are fixed by the owner after receiving the recommendation of Arnheim and Neely, Inc.

j) Any loss suffered in connection with a building managed by Arnheim and Neely, Inc. is solely the loss of the owner of that building and not of Arnheim and Neely, Inc.; similarly as to profits and the benefits of any increase in profits, except that the commissions paid to Arnheim and Neely, Inc. increase or decrease in direct relation to the gross rentals of the building.

k) Arnheim and Neely, Inc. is compensated for its management responsibilities by the owner of the buildings by a percentage of the gross rentals, or in the instances of F. W. Woolworth Co. and University Square No. 1, Inc., on a flat fee basis.

302. Arnheim and Neely, Inc. also conducts the management and maintenance of the managed properties in the following manners:

a) Arnheim and Neely, Inc. investigates the references of all prospective tenants.

b) Arnheim and Neely, Inc. advertises the availability of rentals in the managed buildings. Typical examples are attached as Exhibit 2.

c) Arnheim and Neely, Inc. display signs upon the buildings for purposes of obtaining rentals. Typically such signs are worded "For Rent. Arnheim and Neely, Inc., Agents."

d) Arnheim and Neely, Inc., as agents and in the name of the owner, signs, renews and cancels leases for the premises or any part thereof. Sample copies of leases, renewals, cancellations, and correspondence related thereto are attached as Exhibits 3, 4, 5 and 6.

e) Arnheim and Neely, Inc. in many instances terminates tenancies as agent and in the name of the owner, and is empowered to sign and serve in the name of the owner such notices as are deemed needed by Arnheim and Neely, Inc.

f) Arnheim and Neely, Inc. as agent and in the name of the owner, frequently institutes and prosecutes actions to oust tenants, and to recover rents and other sums due; and, when expedient, compromises, settles, and releases such actions.

g) Arnheim and Neely, Inc. collects all rents from all tenants.

h) Arnheim and Neely, Inc. as agent and in the name of the owner, makes or causes to be made repairs and alterations and supervises same, and does the decorating on the managed premises.

i) Arnheim and Neely, Inc. as agent and in the name of the owner, makes the contracts and pays for all electricity, gas, fuel, water, telephone, window cleaning, ash hauling, vermin extermination, and any

other service required at the managed buildings. See Exhibit 7.

k) When a Contract for Management is terminated, Arnheim and Neely, Inc. draws a check on the appropriate owner's account for the balance, which check is sent to the owner and the owner's account closed.

l) There is some turn-over in the buildings managed by Arnheim and Neely, Inc., with some management accounts being lost and some new ones added periodically. When the management services of Arnheim and Neely, Inc. are terminated with respect to a particular building, the persons working in that building continue to work subject to the recommendation of a new real estate management firm which may take over the management of the building and approval of the owners of the building.

303. In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building super-

intendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. See Exhibit 8.

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members. Exhibit 9 attached is typical of such contracts.

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's staff are are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the

managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The "Contract for Management" (Exhibit 1) provides, with respect to the managed buildings, "that all employees shall be deemed the employees of the OWNER and not the AGENT."

304. The business affairs of the defendant are in other respects conducted as follows:

a) Arnheim and Neely, Inc. maintains a central office at 615 Grant Building in Pittsburgh, Pennsylvania. Approximately fourteen (14) persons are employed by Arnheim and Neely, Inc. at this central office. These employees are engaged in various duties relating to the management of all the managed buildings. Most records, including, but not limited to, those pertaining to rental income and expenses, and the payroll for all persons engaged at all the managed buildings are maintained and kept at the said central office.

b) Some central office employees of Arnheim and Neely, Inc. are regularly and recurringly engaged in corresponding and communicating with tenants in managed buildings at their offices outside the Commonwealth of Pennsylvania, and leases, rentals, and other documents or goods are regularly transmitted to and received from such out of state offices of tenants; and some central office employees are also regularly and recurringly engaged in correspondence and communication with owners of managed buildings at their offices outside the Commonwealth of Pennsyl-

vania, and such correspondence and communication includes the receipt and transmittal of documents and goods such as leases, checks, profit and loss statements, and miscellaneous billings and remittances.

IV

In regard to the persons engaged in the maintenance, and supervision of such activities, at the managed properties, the following facts are stipulated to:

401. During the specified periods herein (stipulated facts following only relate to the inclusive period of December 15, 1963 to December 18, 1965, covered in the investigation by the Wage and Hour and Public Contracts Divisions), the following persons were engaged at the named buildings during the stated periods of time:

a) At the Buhl Building

Henry J. Oberle	12/31/63 - 12/15/65

b) At the Clark Building:

Theodore Hritako	9/14/65 - 10/12/65
Alex B. Taylor	7/13/65 - 10/19/65
Reuben P. Taylor	6/15/65 - 10/19/65

c) At the Eureka Savings Building:

Matthew Arrons	1/11/64 - 12/18/65
Charlotte Alston	5/30/64 - 12/18/65
Edward Anderson	5/30/64 - 12/18/65
Lester Deakles	1/11/64 - 11/27/65
Noel Ford	5/31/64 - 5/ 6/64
Robert Frashley	1/ 4/64 - 5/23/64
Martin Harrison	1/ 4/64 - 6/12/65
Elizabeth Mango	1/ 4/64 - 5/ 1/65
Jack Murphy	1/ 5/64 - 7/25/64
James Starks	1/ 4/64 - 12/18/65
Alice B. Taylor	1/ 4/64 - 5/ 1/65

d) At the Keenan Building:

Raymond Fields	12/18/63-7/ 8/64

e) At the Martin Building:

Blufus Evans	5/15/65-12/15/65
James Hickey	12/31/63-12/15/65
Stanley Mazanek	2/ 1/65- 4/30/65
Robert Rickers	12/31/63-12/15/65
Celestine Sanders	12/31/63-12/15/65
Samuel Sanders	9/ 3/64- 1/31/65
Richard R. Vargo	12/16/63-12/15/65

f) At the Pittsburgh Life Building:

Ruth Baer	8/31/65- 9/15/65
Ernest Bengal	9/15/64-12/31/64
Edward Cholewinski	11/15/64-12/15/65
Ruth Harkins	9/15/64-12/15/65
Kenneth Nixon	9/15/64- 8/20/65
Philomena Lacivita	9/ 1/64-12/15/65
Jesse Magana	6/15/65-12/15/65
Thomas Zapf	9/16/64- 6/15/65

g) At the 319 Fifth Avenue Building:

William Crowley, Jr.	9/15/64-12/15/65
Ronald Duffet	9/15/64-12/15/65
James Lightfoot	9/15/64-12/15/65
Arthur Schmiat	9/15/64-11/20/65

* * * * *

403. If the legal questions presented in this matter are resolved in the affirmative, there will be violations of the minimum wage provisions of Section 6 of the Act in regard to:

a) The Eureka Savings Building to employees:

1. Charlotte Alston
2. Edward Anderson

2. Noel Ford
4. James Starks
5. Lester Deakles
6. Martin Harrison
7. Elizabeth Manago
8. Alice Taylor

b) The Martin Building to employees:

1. Celestine Sanders

c) The Pittsburgh Life Building to employees:

1. Kenneth Nixon
2. Ruth Baer
3. Philomena Lacivita
4. Ruth Harkins
5. Jesse Magana
6. Thomas Zapf

d) The 819 Fifth Avenue Building to employees:

1. William Crowley, Jr.
2. Donald Duffett
3. Arthur Schmiat
4. James Lightfoot

404. If the legal questions presented in this matter are resolved in the affirmative, there will be violations of the overtime provisions of Section 7 of the Act in regard to:

a) The Buhl Building to employees:

1. Henry Oberle

b) The Clark Building to employees:

1. Theodore Hritako
2. Alex C. Taylor
3. Boden P. Taylor

c) The Eureka Building to employees:

1. Manther Aarons
2. Robert Freshley
3. Martin Harrison
4. Jack Murphy
5. Alice Taylor
6. Edward Anderson
7. James Starks

d) The Keenan Building to employees:

1. Raymond Fields

e) The Martin Building to employees:

1. Blufus Evans
2. James Hickey
3. Stanley Mazanek
4. Robert Rickers
5. Samuel Sanders
6. Celestine Sanders
7. Richard Vargo

f) The Pittsburgh Life Building to employees:

1. Edward Cholewinski
2. Ernest Bengal
3. Ruth Baer
4. Philomena Lacivita
5. Kenneth Nixon
6. Jesse Magana
7. Ruth Harkins

g) The 319 Fifth Avenue Building to employees:

1. William Crowley, Jr.
2. Ronald Duffet
3. James Lightfoot
4. Arthur Schmiat

* * * * *

407. In regard to the records maintained by Arnheim and Neely, Inc. the following facts are stipulated to:

a) The hours worked by the approximately 14 employees at the subject's main office were not recorded either as to daily or weekly hours.

b) The scheduled hours which the maintenance personnel at the various buildings were to work were recorded. However, the actual hours worked were not recorded for numerous employees, and said actual hours differed from the scheduled hours as to the following employees at the following buildings:

1. Buhl Building—Henry J. Oberle.

2. Eureka Building—Charlotte Alston, Edward Anderson and Lester Deakins

3. The Martin Building—Richard Vargo.

4. The Pittsburgh Life Building—Ernest Bengal, Kenneth Nixon, Edward Cholewinski, Ruth Harkins and Philomena Lacivita.

5. The 312 Fifth Avenue Building—William Crowley, Jr., Ronald Duffett, James Lightfoot and Arthur Schmiat.

V

501. The persons employed in the maintenance of the managed buildings in issue herein engaged in the following activities:

a) Buhl Building

1. Sally Lewichi was regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to

the tenants throughout the building, and (b) in personally carrying light parcels to tenants throughout the building, some portion of the aforementioned goods originating outside the Commonwealth of Pennsylvania.

2. Henry Oberle, building superintendent, as part of his assigned duties, personally engaged in carrying parcels to tenants throughout the building, a portion of said parcels originating outside the state; and in supervising the aforementioned employee Lewicki.

b) Clark Building

1. Two employees engaged at the said building were regularly and recurringly, daily and with more frequency as part of their assigned duties, engaged in operating elevators (a) carrying mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

2. Some other employees at the said building were engaged in maintenance work.

c) Eureka Savings Building

1. Charlotte Alston was regularly and recurringly, as part of her assigned duties, daily and with more frequency, engaged in (a) the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) transporting deliverymen carrying packages to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

2. Edward Anderson was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) in operating a freight elevator carrying packages, crates and boxes containing merchandise to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

3. Lester Deakles was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged (a) in the operation of an elevator carrying mailmen delivering mail and parcel post to the tenants throughout the building, and (b) in operating a freight elevator carrying packages, crates and boxes containing merchandise to be distributed throughout the said building to tenants in the building, a portion of which named goods originated outside the Commonwealth of Pennsylvania.

4. Noel Ford was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

5. James Starke was regularly and recurringly, as part of his assigned duties, daily and with more frequency, engaged in operating freight elevators carrying merchandise in packages, crates or boxes to be distributed throughout the building to tenants in the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

6. Freight service as referred to in subparagraphs 1, 2 and 5 above is a customary service rendered to tenants in said buildings.

7. Some other employees at the said building were engaged in maintenance work.

d) Keenan Building

1. George Langsdale operated a freight elevator on a regular and recurring basis, daily and with more frequency as part of his assigned duties, (a) carrying freight brought to the building for tenants in the building, a portion of which came in from out of state, and (b) carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

2. Edward Gift was regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

3. Freight service as referred to in subparagraph 1 above is a customary service rendered to tenants in said building.

4. Some other employees at the said building were engaged in general maintenance work.

e) The Martin Building

1. Celestine Sanders was regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen

delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

2. Richard R. Vargo operated the freight elevator on a regular and recurring basis, daily and with more frequency as part of his assigned duties, carrying freight brought to the building to tenants in the building, a portion of which comes in from out of state.

3. Freight service referred to in subparagraph 2 above is a customary service rendered to tenants in said building.

4. Some other employees at the said building were engaged in general maintenance work.

(f) Pittsburgh Life Building

1. Ruth Baer regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

2. Ruth Harkins regularly and recurringly, daily and with more frequency as part of her assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

3. Philomena Lacivita regularly and recurringly, daily and with more frequency, as part of her as-

signed duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen carrying packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

4. Kenneth Nixon, as part of his assigned duties, engaged in transporting in elevators (a) mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

5. Ernest Bengel regularly and recurringly, daily and with more frequency, as part of his assigned duties, supervised elevator operators (a) transporting in elevators mailmen carrying mail and parcel post to various tenants throughout the building and (b) deliverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania.

6. Edward Cholewinski supervised the elevator operators and other employees as part of his assigned duties.

7. Some other employees employed at the said building engaged in general maintenance work.

g) 319 Fifth Avenue Building

1. William Crowley, Jr., regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged (a) in operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) de-

liverymen delivering packages to various tenants throughout the building, a portion of which goods originated outside the Commonwealth of Pennsylvania, and (b) in operating the freight elevator carrying freight brought to the building for distribution to tenants in the buildings, a portion of all named goods originated out-of-state and (c) in carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

2. Ronald Duffett regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in (a) operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) deliverymen delivering packages to various tenants throughout the building, (b) in operating a freight elevator carrying freight brought to the building for distribution to tenants in the building, a portion of all named goods originating out-of-state, and (c) in carrying freight from tenants in the building destined for shipment outside the Commonwealth of Pennsylvania.

3. Arthur Schmist regularly and recurringly, daily and with more frequency as part of his assigned duties, engaged in (a) operating an elevator carrying 1) mailmen delivering mail and parcel post to the tenants throughout the building, and 2) deliverymen delivering packages to various tenants throughout the building, (b) in operating a freight elevator carrying freight brought to the building for distribution to tenants in the building, a portion of all named goods originated out-of-state, and (c) in carrying freight from tenants in the building des-

tined for shipment outside the Commonwealth of Pennsylvania.

4. Freight service as referred to in subparagraphs 1, 2, and 3 above is a customary service rendered to tenants in said building.

5. Some other employees employed at the said building engaged in general maintenance work.

502. The persons employed in the maintenance of the managed buildings in issue herein regularly and recurringly, daily and with more frequency, handle goods and work with goods that have been moved from points outside the Commonwealth of Pennsylvania, including such goods as soap, detergent, waxes, and light bulbs.

503. A number of employees of Arnheim and Neely, Inc. at the central office in the Grant Building engage on a regular and recurring basis, as part of their assigned duties, daily and with more frequency, in the following activities:

a) Preparing and transmitting correspondence to out-of-state persons and concerns.

b) Making telephonic communications with out-of-state persons or concerns.

c) Preparing and transmitting documents such as leases, checks, profit and loss statements, etc., to out-of-state persons and concerns.

d) Receiving correspondence from out-of-state persons and concerns.

e) Receiving telephonic communications from out-of-state persons and concerns.

f) Receiving documents, such as leases, profit and loss statements, etc. from out-of-state persons and companies.

CHARLES DONAHUE
Solicitor of Labor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
Deputy Regional Attorney
United States Department of Labor

GUSTAVE DIAMOND
United States Attorney
Attorneys for Plaintiff

MR. EUGENE B. STRASSBURGER
Strassburger and McKenna
Attorney for Defendant

MR. FRANK L. SEAMANS
Eckert, Seamans and Cherin
Attorney for Intervenor

[Filed Dec. 19, 1968]

EXHIBIT 1

CONTRACT FOR MANAGEMENT

In consideration of the covenants herein contained, _____

_____

_____

(hereinafter called "OWNER") and ARNHEIM & NEELY, INC. (hereinafter called "Agent"), agree as follows:

1. The OWNER hereby employs the AGENT exclusively to rent, lease, operate and manage the property known as: _____

_____

_____

_____

upon the terms hereinafter set forth for the period of _____ beginning on the ____ day of _____ 19__, and ending on the ____ day of _____ 19__, and thereafter from year to year, unless on or before sixty (60) days prior to the date last above mentioned, or on or before thirty (30) days prior to the expiration of any such renewal period, either party hereto shall notify the other in writing of an intention to terminate this agreement in which case this agreement may be thereby terminated on the last mentioned date.

2. The AGENT agrees:

A. To accept and does hereby accept the management of the said premises for the period and upon the terms herein provided, and agrees to furnish the services of its organization for the renting, operating and managing of said premises.

B. To investigate carefully all references of prospective tenants.

C. To aid, assist and co-operate in the matter of real property taxes and insurance loss adjustments, and to perform such duties in connection therewith as may be requested by the OWNER.

D. To care for, place and supervise, subject to OWNER'S instructions, all insurance coverage.

E. To render monthly statements to the OWNER, not later than the ____ day of each month, remitting the amount collected during the previous month, less disbursements made on behalf of and for the account of OWNER, AGENT may withhold a sum not to exceed $_____ as a reserve to meet obligations which will or may become due thereafter and for which current income will not or may not be adequate.

F. To deposit all receipts collected for OWNER (less any sums properly deducted as otherwise provided herein) in a Trust Account, separate from AGENT'S personal account. However, AGENT will not be held liable in event of bankruptcy or failure of a depository.

G. AGENT'S employees who handle or are responsible for OWNER'S monies shall be bonded by a fidelity bond.

H. To account to the OWNER for all rebates and/or discounts that AGENT may receive on account of expenditure or contracts for the account of said premises and all such rebates and/or discounts shall accrue to the benefit of the OWNER.

I. _____

_____

_____

_____

_____

3. The OWNER hereby gives the AGENT the following authority and powers, and agrees to assume all expense incurred in connection therewith:

A. To advertise the availability for rental of the herein described premises or any part thereof for rent provided, however, that such expenditures shall not in the aggregate exceed $_____ in any one year period; to display signs thereon; to sign, renew and/or cancel leases for premises or any part thereof, with express authority in the AGENT to sign leases for terms not in excess of _____ years; to terminate tenancies and to sign and serve in the name of the OWNER such notices as are deemed needful by AGENT; to institute and prosecute actions to oust tenants and recover possession; to sue for in the name of the OWNER and recover rents and other sums due; and, when expedient, to settle, compromise and release such actions or suits or reinstate such tenancies.

B. To collect rents due or to become due and give receipts therefor.

C. To make or cause to be made and supervise repairs and alterations and to do decorating on the premises; to purchase supplies and pay all bills. The AGENT agrees to secure the ap-

proval of the OWNER on all expenditures in excess of $_____ for any one item, except monthly or recurring operating charges, and/or emergency repairs in excess of the maximum, if in the opinion of the AGENT, such repairs are necessary to protect the property from damage or to maintain services to the tenants as called for by their tenancy.

D. To hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises; it being agreed that all employees shall be deemed the employees of the OWNER and not the AGENT, and that the AGENT may perform any of its duties through its attorneys, agents or employees and shall not be responsible for their acts, defaults or negligence if reasonable care has been exercised in its appointment and retention. The AGENT shall not be liable for any error of judgment or for any mistake of fact of law, or for anything which it may do or refrain from doing hereunder, except in cases of willful misconduct or gross negligence.

E. To make contracts for electricity, gas, fuel, water, telephone, window cleaning, ash hauling, vermin extermination and other services or such of them as the AGENT shall deem advisable; the OWNER to assume the obligation of any contract so entered into at the termination of this agreement.

_____

_____

_____

4. The OWNER further agrees:

A. To save the AGENT harmless from all damage suits and costs incurred therefrom in connection with the management of the premises and from liability from injuries suffered by any employee or other person whomsoever and to carry, at his own expense, necessary liability and compensation insurance adequate to protect the interest of the parties hereto, which policies shall be so written as to protect the AGENT in the same manner and to the same extent as the OWNER.

B. To advise the AGENT in writing if payment of mortgage indebtness, property or employee taxes, special assessments or the placing of fire, liability, steam boiler or any other insurance is desired.

C. Upon and after the termination of this agreement pursuant to the method described in Paragraph 1 hereof, OWNER shall recognize AGENT as the broker in any pending negotiations for the leasing of said premises, or any part thereof, and in the event of the consummation thereof OWNER shall pay to AGENT a commission therefor at the rate prescribed in Paragraph 4, Subsection E(2) hereof.

D. To give the AGENT the authority, and agree to assume the expense incurred in connection therewith, to provide, equip and maintain a suitable office in the premises, if deemed advisable by the AGENT. The location of such office and the expenses of equipping and maintaining same shall be subject to the OWNER's approval.

E. To pay the AGENT each month:

(1) FOR MANAGEMENT: _____ per cent of the gross amount of money received from the operation of said premises during the period herein provided.

(2) FOR LEASING: _____ per cent of the total consideration of the lease on all leases to new tenants secured, and _____ per cent for renewals of leases during the period herein provided for, payable in cash on signing of the lease.

(3) FOR SUPERVISION OF REPAIRS: _____

_____

_____

F. Special clauses _____

_____

_____

_____

5. The OWNER hereby instructs the AGENT to pay, out of the rents collected from the premises, the following items of expense other than normal operation expense: _____

_____

_____

_____

6. This agreement is entered into by and between the OWNER and AGENT, and shall be binding upon the successors and assigns of the AGENT, and the heirs, executors, administrators, successors and assigns of the OWNER.

IN WITNESS WHEREOF the parties hereto have affixed or caused to be affixed their respective signatures this ____ day of _____ 19__.

WITNESS:

_____ _____

_____ _____

_____ _____

_____ _____

OWNER.

ARNHEIM & NEELY, INC.

_____

President Secretary

AGENT.

CONTRACT FOR MANAGEMENT

between

OWNER

and

ARNHEIM & NEELY, INC.

For property located at

_____

_____

Beginning _____ 19__

Ending _____ 19__

Exhibit 9

AGREEMENT

THIS AGREEMENT made the 18th day of March, 1965, by and between 701 LIBERTY AVENUE REALTY COMPANY, a partnership, owner and operator of the Clark Building, by ARNHEIM & NEELY, INC., agent, hereinafter referred to as the "EMPLOYER",

and

LOCAL UNION No. 5, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, hereinafter referred to as the "UNION".

WITNESSETH:

1. The Employer recognizes the Union as the exclusive representative of the electrical workers in the employ of the Clark Building.

2. The Employer agrees to employ at least one (1) journeyman electrician as an electrical maintenance man, and as many additional journeyman electricians as may be needed from time to time.

3. (a) Effective January 1, 1965, the wages of the journeyman electrician shall be $4.425 per hour or $177.00 per week. If additional electrical maintenance men are employed, the wages of such additional men shall be $4.25 per hour or $170.00 per week.

(b) Effective January 1, 1966, the wages of the journeyman electrician shall be $4.575 per hour or $183.00 per week. If additional electrical maintenance men are employed the wages of the additional men shall be $4.40 per hour or $176.00 per week.

4. The regular work week shall be eight (8) hours per day, five (5) days per week, Monday to Friday inclusive, or a total of forty (40) hours per week. All work in excess of 40 hours per week shall be paid at the rate of time and one-half.

5. The electrical maintenance men shall be paid for, but shall not be required to work on, the following holidays:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

6. If extra electrical workers are hired as maintenance men, the Employer shall pay for said work at the rate set out in paragraph 3 hereof if continuously employed for at least three (3) months. If, however, dismissed sooner than in three (3) months, these men shall be paid at the prevailing hourly rate for journeyman electrical workers.

7. Electrical maintenance men shall receive two (2) weeks' vacation with pay, provided the employee has been in the service of the Employer for at least one (1) year.

8. It is agreed that in accord with the National Employees Benefit Agreement entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, that unless authorized otherwise by Article 5, Section 2(b) of the National Employees Benefit Agreement the individual employer will forward monthly to the designated Local Employees Benefit Board an amount equal to 3% of his gross monthly labor payroll, which he is obligated to pay to the employees in this bargaining

unit, and a complete payroll report prescribed by the National Board. The payment shall be made by check or draft and shall constitute a debt due and owing to the National Board on the last day of each calendar month, which may be recovered by suit initiated by the National Board or its assignee. The payment and the payroll report shall be mailed to reach the office of the appropriate Local Board not later than seven (7) calendar days following the end of each calendar month.

In the event the Employer is authorized by Article 5, Section 2(b) of the National Employees Benefit Agreement to make the required payments on a time basis other than the monthly basis previously stated, such Employer shall be obligated by this Agreement to comply with the provisions of the said Article 5, Section 2(b) of the National Employees Benefit Agreement.

Individual employers who fail to remit as provided above shall be additionally subject to having this Agreement terminated upon seventy-two (72) hours' notice in writing being served by the Union, provided the individual employer fails to show satisfactory proof that the required payments have been paid to the Local Employees Benefit Board.

The failure of an individual employer to comply with the applicable provisions of the National Employees Benefit Agreement shall also constitute a breach of this labor agreement.

9. This Agreement shall be effective beginning January 1, 1965, and shall continue in force for two (2) years, until December 31, 1966.

701 LIBERTY REALTY COMPANY,
a partnership

by ARNHEIM & NEELY, INC., Agent

LOCAL UNION NO. 5,
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

AGREEMENT

EXHIBIT 9

THIS AGREEMENT made and entered into this 22 day of December, 1964 to be effective as of December 1, 1964, by and between BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 29, AFL-CIO, hereinafter called the "Union."

AND

UNIVERSITY SQUARE NO. 1, INC., a Pennsylvania Corporation, hereinafter called the "Employer."

WITNESSETH:

WHEREAS, the parties hereto desire to establish a standard of wages and conditions under which members of the Union shall work for the Employer during the term of this Agreement; and

WHEREAS, the members of the Union have bound themselves together to conform and comply with the existing by-laws, regulations and rules of the Building Service Employees International Union for their welfare and benefit; and

WHEREAS, it is the intention of both parties hereto to mutually agree upon certain salutary terms and provisions to guide in the amicable and beneficial execution of this contract, realizing it to be the best method of creating a thorough understanding between employer and employee;

NOW, THEREFORE, in consideration of the above, both parties mutually agree to the following:

FIRST: The Employer does hereby recognize and acknowledge the above stipulated Union as the true and only representative of the employees involved herein, as set forth in Exhibit "A" attached to this Agreement, and does admit precedence of this contract as the governing factor over the within named employees, and does hereby declare that during the life of this contract it will not enter into a contract for the same employees with other unions who may claim jurisdiction over the employees within named, providing this clause does not conflict with any State or Federal statute, or any adjudication by any court of law.

SECOND: The Employer agrees that in the building operated by UNIVERSITY SQUARE No. 1, INC., known as University Square No. 1, located at 4625 Fifth Avenue, Pittsburgh, Pennsylvania, it will employ and continue in its employment, for the employees covered by this Agreement, during the period covered by this Agreement, only members of Local No. 29 in good standing. In the event the Union is called upon and does not furnish workers satisfactory to the Employer, the Employer may employ other than a union member, who must, however, become a member of the Union within two (2) weeks, and such worker shall not be denied membership except for just cause. Employer reserves the right to determine who is a satisfactory employee.

(a) For the purpose of this Agreement, it is understood that when a member is suspended or expelled by the Union, and written notification of such action is received by the Employer, such employee is to be regarded as not in good standing and subject to immediate discharge by the Employer.

THIRD: It is agreed that the wages and hours herein noted and made part of this Agreement in Exhibit "A" hereof shall be regarded as minimum wages and hours and this Agreement shall not interfere with any employee receiving higher wages than the minimums contained in this contract.

(a) Effective December 1, 1964, there shall be a general wage increase of three and one-half (3½%) per cent.

(b) Effective December 1, 1965, there shall be a general wage increase of five (.05¢) cents per hour.

(c) Effective December 1, 1966, there shall be a general wage increase of five (.05¢) cents per hour.

(d) In addition to the cash wages as specified in Exhibit "A" the Employer agrees to provide certain insurance benefits for all full-time union employees as herein noted and made part of this Agreement and marked Exhibit "B".

FOURTH: The work schedules shall be so arranged that no employee shall work more than eight (8) hours in any given day, except as otherwise herein provided.

(a) There shall be no spreading of work hours. The hours must be consecutive, excepting lunch periods.

(b) A one (1) hour lunch period shall be provided, exclusive of the number of hours worked in any given day, except in cases where the practice of a shorter lunch period is in force.

(c) Employees shall be scheduled on a five (5) day week basis; however, days off need not be consecutive. The Employer shall have the right in each instance to fix schedules.

FIFTH: The work week shall consist of forty (40) hours work, and time and one-half shall be paid for all hours worked in excess of forty (40) hours per week or eight (8) hours in one day. There shall be no pyramiding of overtime hours.

SIXTH: Salaries shall be paid semi-monthly.

SEVENTH: All privileges, benefits or prerogatives previously enjoyed by an employee prior to the introduction of this Union Agreement shall remain intact and in full force and no employee shall at any time suffer as a result of this Agreement.

(a) It is also understood and agreed that a high standard of efficiency of service in the building must be maintained.

(b) Work rules and regulations promulgated by the management shall be posted in the manager's office and a copy also shall be delivered to each employee whenever any such rules or regulations are promulgated. Work rules shall not be inconsistent with the terms and provisions of this Agreement.

EIGHTH: The Employer is empowered to hire and has the right to discharge any employee for just cause. Dishonesty and intoxication shall be deemed among the causes sufficient for dismissal without hearing, as hereinafter provided. The Union recognizes the right of Management to direct and control the policies of Management, so long as those policies do not violate any provisions of this Agreement.

NINTH: No change shall be made from men to women, or vice versa, except with the consent of the Union.

TENTH: The Employer shall have the right to determine the number and character of positions to be filled by employees. In case of layoffs, departmental seniority shall be followed with due consideration for competency and the efficiency and the special needs of the departments involved.

a) Consideration shall be given to those already employed in filling vacancies, based on seniority, with due consideration for training, ability, competency, efficiency and appearance for the particular job.

ELEVENTH: Holidays shall be granted to regular employees as follows: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

(a) For the purpose of the preceding paragraph, skeleton crews reporting for work on the holidays named herein shall receive an additional day's pay at the prevailing rate.

(b) When one of the above designated holidays falls on Sunday, it will be observed on the following Monday and not on Sunday.

(c) Any regular full time employee whose regular day off falls on a holiday shall receive an additional day's pay therefor, or, at the option of the Employer, shall receive an extra day off within the holiday week.

(d) If a holiday falls within the employee's vacation period, he shall receive the holiday pay or an additional day off at the option of the Employer.

TWELFTH: Employees who have worked continuously for one (1) year and less than two (2) years shall receive one week's vacation with full pay. Employees who hav worked continuously for two (2)

years and less than ten (10) years shall receive two (2) week's vacation with full pay. Employees who have worked continuously for ten (10) years or more, shall receive three (3) week's vacation with full pay. Such vacations shall be taken between May 1st and September 30th of each year unless otherwise agreed upon.

THIRTEENTH: If a grievance should arise, the employee shall take same up with his shop-steward. The shop-steward shall refer the grievance to the foreman or head of the department involved. If the matter is not adjusted to the complainant's satisfaction, he may appeal to the manager of the building.

(a) The employee involved in the dispute may carry his case to the Union if the decision rendered is not satisfactory.

(b) The Union shall use the following medium in an effort to arbitrate the dispute involved. A duly authorized representative of the Union shall meet with the representative of the Employer in an effort to further adjust the controversy. If the representatives so constituted are unable to agree on a decision, a third person shall be selected by the representative of the Union and the representative of the Employer, who shall be a disinterested party and whose awards shall be binding and final on both parties. In the event any costs are incurred in such arbitration, each party hereto agrees to assume and pay one-half of such costs so incurred, without reference to the decision rendered by said arbitrator.

FOURTEENTH: It is expressly agreed that the employee filling the position of foreman in the building shall not be an employee covered by the terms of this

Agreement; provided, however, that at any time hereafter the Employer may require such employee to come within the coverage of this Agreement.

FIFTEENTH: Initiation fees and dues shall be deducted from the pay of each employee by the Employer and shall be remitted to the Secretary-Treasurer or duly authorized representative of the Union. Same shall be accompanied by a list of employees from whom the deductions were made and shall be remitted to the Union not later than the fifteenth (15th) day of the current month. The Union agrees that it will furnish each employee with a receipt acknowledging payment of said dues or initiation fees. Employees shall be required as a condition of employment to furnish authorization to the Employer to make deductions as hereinbefore set forth.

SIXTEENTH: Any employee who is called for service as a juror shall be excused from work for the days on which he serves, and he shall receive for each such day of jury service on which he otherwise would have worked the difference between eight times his hourly base rate and the payment he receives for jury service, up to a limit of eight hours per day and forty hours per week. The employee shall present proof of service and the amount of pay received therefore.

SEVENTEENTH: In the event of the death of the wife, husband, son, daughter, parent, brother or sister of any employee covered by this Agreement who has been in the employ of the Employer for at least ninety (90) days, the employee shall be paid his regular straight time rate for scheduled time lost from work up to but not to exceed three (3) days of not more than eight (8) hours each, it being understood

that payment for such lost time off may include but not extend beyond the day after burial if the day after burial is a work day; and further, provided, the employee attends the funeral and furnishes proof thereof, if requested by the Employer.

EIGHTEENTH: No employee or applicant for employment covered by this Agreement shall be discriminated against because of membership in the Union or activities on behalf of the Union. Neither the Employer nor the Union shall discriminate for or against any employee or applicant for employment, covered by this agreement, on account of race, color, religious creed or national origin.

NINETEENTH: The employer shall inform all employees at the time of hire of the existence and terms of this Agreement and the obligations of such employee as to Union membership. The Employer agrees, within thirty (30) days of the date of hiring, to notify the Union of the name, address and classification of occupation of each such person so hired.

TWENTIETH: This Agreement shall continue from its effective date of December 1, 1964 until November 30, 1967, and it is mutually agreed there will be no strike or lockout for any reason whatsoever during the specified term thereof. It is also understood and agreed that:

In the case of emergencies such as flood, fire, etc., the terms of this Agreement shall not apply in connection with such measures as the Employer may deem it necessary to take for the protection of the building and afterward to put it into condition for occupancy.

IN WITNESS WHEREOF and to duplicate hereto of like tenor and effect, the parties hereto have hereunto affixed their hands and seals the day and year first above written.

UNIVERSITY SQUARE NO. 1, INC.
Arnheim & Neely, Inc., Agents

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 29, AFL-CIO

Exhibit "A"

Wage Schedule

Effective December 1, 1964 to November 30, 1967

Between

University Square No. 1, Inc.

and

Building Service Employees International Union, Local No. 29, AFL-CIO

CLASSIFICATION	MONTHLY WAGES EFFECTIVE		
	12-1-64	12-1-65	12-1-66
*Housemen	$314.95	$328.60	$332.25

Approved:

University Square No. 1, Inc.
Arnheim & Neely, Inc., Agents

Building Service Employees International Union, Local No. 29, AFL-CIO

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* Housemen shall have such general duties as are assigned to them by the manager of the corporation's apartment building that may be necessary or incidental to the proper maintenance, cleaning and upkeep of the building and grounds, including without limiting the generality of the foregoing, such garage duties, including car washing and polishing as may be assigned to them.

Exhibit "B"

University Square No. 1, Inc.

INSURANCE BENEFITS

Life Insurance—Male	$3,000.00
Accidental Death and Dismemberment Insurance—Male	$3,000.00
Life Insurance—Female	$1,500.00
Accidental Death and Dismemberment Insurance—Female	$1,500.00
Hospital—Room and Board (70 days)	$ 12.00 per day
Hospital—Special charges expense insurance	$ 420.00
Surgical expense insurance	$ 300.00
Ambulance expense insurance	$ 20.00
Polio expense insurance	$5,000.00
Weekly sick benefits—(13 weeks)	$ 30.00 per week
In-hospital medical care	$ 5.00 per day

[Caption Omitted]

ORDER

By agreement of the parties, the motion of The Institution of Real Estate Management of the National Association of Real Estate Boards to intervene is hereby granted, with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period.

It is so ordered this 13th day of January, 1969.

JOHN L. MILLER,
United States District Judge

[Caption Omitted]

ORDER TO SUBSTITUE PARTY PLAINTIFF

Upon motion by attorney for the plaintiff, it is hereby ORDERED that George P. Shultz, Secretary of Labor, United States Department of Labor, be substituted as Party Plaintiff in the above captioned action, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

GEORGE J. WEBER,
United States District Judge

[Filed Feb. 12, 1969]

[Caption Omitted]

MOTION FOR SUMMARY JUDGMENT

Plaintiff, George P. Shultz, Secretary of Labor, United States Department of Labor, in accordance with Rule 56 of the Federal Rules of Civil Procedure, moves this Honorable Court to grant summary judgment to plaintiff against defendant Arnheim and Neely, Inc. and Intervenor, The Institute of Real Estate Management of the National Association of Real Estate Boards, on the ground that the stipulation of the parties filed herein and the pleadings show that no genuine issue of material fact exists in this case and that the plaintiff is entitled to judgment as a matter of law.

[Filed March 20, 1969]

HAROLD C. NYSTROM
Acting Solicitor of Labor

LOUIS WEINER
Regional Attorney

MARSHALL H. HARRIS
Deputy Regional Attorney
United States Department
of Labor

GUSTAVE DIAMOND
United States Attorney
Attorneys for Plaintiff

[Caption Omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Now come Arnheim and Neely, Inc., Defendant herein, by its attorneys, Eugene B. Strassburger, Jr., and Strassburger & McKenna, and The Institute of Real Estate Management of The National Association of Real Estate Boards, Intervener herein, by its attorneys, Frank L. Seamans and Eckert, Seamans & Cherin, and hereby move your Honorable Court for summary judgment in favor of Defendant, pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, and in support thereof represent as follows:

1. The record before the Court on which the within Motion is based consists of the pleadings and stipulations of fact entered into by and between the parties to this action. Said stipulations have been filed with the Court and are a matter of record.

2. The moving parties submit that on the aforesaid record there are no substantial issues of fact to be determined or in dispute, and that said record

shown that Defendant is entitled to judgment in its favor as a matter of law.

EUGENE B. STRASBURGER, JR.
Strasburger & McKenna,

Attorneys for Defendant,
Arnheim & Neely, Inc.

FRANK L. SEAMANS,
Eckert, Seamans & Cherin,

Attorneys for Intervener, The Institute of Real Estate Management Of The National Association of Real Estate Boards.

[Filed April 9, 1969]

OPINION

[Caption Omitted]

MILLER, D.J.

By his Complaint, plaintiff, Secretary of Labor of the United States Department of Labor, seeks injunctive relief to enjoin alleged violations of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 251(a)(2), 215(a)(5).

Defendant, Arnheim and Neely, Inc., is a Pennsylvania corporation engaging in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities. It answered the Complaint denying salient allegations thereof.

On January 17, 1968, the Institute of Real Estate Management of the National Association of Real Estate Boards filed a motion to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 24. On January 13, 1969, "[b]y agreement of the parties," the Court granted the Motion" . . . with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period." Intervener answered the Complaint on January 17, 1968, denying salient allegations thereof.

On December 19, 1968, the parties filed a lengthy stipulation [hereinafter abbreviated "Stip."].[1] On

[1] Although the Stipulation was filed prior to the Order granting leave to intervene, the Stipulation was executed by counsel for intervener.

March 20, 1969, plaintiff moved for summary judgment "... on the ground that the stipulaton of the parties filed herein and the pleadings show that no genuine issue of material fact exists ... and that the plaintiff is entitled to judgment as a matter of law." On April 9, 1969, defendant and intervenor moved for summary judgment asserting lack of a contested factual issue and demanding judgment as a matter of law.[1]

According to the Stipulation, defendant, since January 1, 1968, has managed nine buildings in the Greater Pittsburgh area.[2] [Stip. ¶ 204] Defendant owns none of these buildings. [Stip. ¶ 208][3] Its rentals and sales are performed by approximately fourteen employees on defendant's payroll. [Stip. ¶ 210] The case at bar concerns "persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant. ..." [Stip. ¶ 2]

The Stipulation sets forth issues formulated from the pleadings. [Stip. ¶¶ 1-8] This Opinion will review these issues of law so tendered.

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[1] The following were also filed: "Plaintiff's Brief in Support of Summary Judgment"; "Defendants' Brief in Support of Summary Judgment", filed jointly by defendant and intervenor; and Plaintiff's "Reply Brief in Support of Summary Judgment."

[2] Defendant maintains its principal office and place of business in the Grant Building, Pittsburgh, Pennsylvania. [Stip. ¶ 201]

[3] Defendant owns 50 of 2850 shares of a corporation which owns one of the buildings. [Stip. ¶ 208]

Issue

"Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant 'employees' of the defendant within the meaning of the Act?" [Stip. ¶ 2]

Paragraph 303 of the Stipulation asserts:

"In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building superintendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. . . .

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members. . . .

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's [sic] staff are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The 'Contract for Management' (Exhibit 1 [to the Stipulation]) provides, with respect to the managed buildings, 'that all employees shall be deemed the employees of the OWNER and not the AGENT.' "

Elsewhere in the Stipulation, it is asserted that "[e]ach building owner has separate employer's identification numbers for federal, state, and city payroll taxes." [Stip. ¶ 301(g)]

Section 6 of the Fair Labor Standards Act defines the following terms:

* * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d).

"(e) 'Employee' includes any individual employed by an employer . . . ." 29 U.S.C. § 203(d).

In *Greenberg* v. *Arsenal Bldg. Corp.*, 50 F. Supp. 760 (S.D. N.Y. 1943), aff'd per curiam 144 F. 2d 292 (2 Cir. 1944), rev'd in part on other grounds sub nom *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), where suit was brought against a building rental agent, both the District and the Circuit Court held the defendant to be an "employer" within the meaning of the Act.*

Viewed broadly, the relationship described in the Stipulation between defendant and the employees comports with the statutory standard of employer-employee. See *United States* v. *Silk*, 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947). It remains only to review certain aspects peculiar to this relationship to determine whether or not they require a contrary determination.

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* *Greenberg* asserted liability on the ground that the rental agent was an "employer" "acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 50 F. Supp. 760; cf. *United States* v. *Klinghoffer Bros. Realty Corp.*, 285 F. 2d 487 (2 Cir. 1960). As developed more fully, *infra*, our analysis does not view defendant as simply "acting in the interest of an employer."

In *Bartels* v. *Birmingham*, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A.L.R. 317 (1947), band leaders resisted liability to their musicians on the grounds, inter alia, that leaders' contracts with ballroom operators specified that the musicians were to be regarded as employees of the operators rather than of the leader. The agreements also required filing of various social security taxes by the operators. Notwithstanding these features, the Supreme Court, reversing the Circuit Court's judgment, held the leaders liable.

The sole remaining element to be considered is the reservation by the owners of a right to review certain of defendant's determinations regarding the management of its building. It may well be that these provisions vest the owners with certain control over the employees. However, the Act recognizes the concept of joint employment. *Mitchell* v. *John R. Cowley & Bro., Inc.*, 292 F. 2d 105 (5 Cir. 1961); *Wirtz* v. *Hebert*, 363 F. 2d 139 (5 Cir. 1966); *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (10 Cir. 1942). Although the proprietors of the individual buildings may perhaps be deemed employers, *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 201 (W.D. Tenn. 1965), this circumstance does not foreclose treating defendant as an employer within the meaning of the Act.

Defendant contends that Congress' adoption of the "enterprise" formula in 1961 requires a new test for determining the employer-employee relationship. We cannot agree. The Fair Labor Standards Amendments of 1961, Pub. L. 87-30, 75 Stat. 65 (U.S. Code Cong. & Adm. News 1961, p. 71 et seq.), [merely re-

pealed]" the prior provision limiting coverage to employees "engaged in commerce or in the production of goods for commerce" and provided coverage to all employees in an "'enterprise' engaged in commerce or production for commerce." *Maryland v. Wirtz*, 392 U.S. 183, 185, 186, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968). The 1961 amendments were unaccompanied by any modification in the definition of "employee", "employer" or "employment."[4] The decisional law reflects no change in the pre-1961 principle utilized for determining the employer-employee relationship.

Defendant relies on the statement in *Bartels v. Birmingham, supra*: ". . . In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business as to which they render service." 332 U.S. 130. It contends that the business to which they render service is the building rather than defendant.

The statement in Bartels must be interpreted in the light of the judicial history construing the term "employee." As described in *Illinois Tri-Seal Products, Inc. v. United States*, 353 F. 2d 216 (Ct. Cl. 1965), in the years following the enactment of the Act in 1935, the Treasury Department and a majority of the courts held that the term was to be given its common-law meaning, which was grounded in the element of control. In 1947, the Supreme Court de-

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[4] The bracketed words were subsequently struck by the Act and the words "changed the basis of" were substituted.

The Fair Labor Standards Amendments of 1966, Pub. L. 89-601, 80 Stat. 830 (U.S. Code Cong. & Adm. News 1966, p. [illegible] et seq.) likewise made no modifications in the statutory definitions.

cided *United States v. Silk*, *supra*, holding that a "constricted interpretation" of the term "employee" to exclude all who are independent contractors within common-law concepts failed "to accomplish the purposes of the legislation." 331 U.S. 712.

Defendant seeks to utilize the "economic reality" doctrine to mitigate the indicia of its control of the employees. No warrant for this lies in the decisional law.

Defendant cites a section of the Senate Report No. 1487, 89th Cong., 2d Sess. (1966), on the 1966 Amendments to evidence a legislative intent to treat the employees in question as employees of the building owners:

> ". . . where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, these individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner." 1966 U.S. Code Cong. & Adm. News, p. 3029.

Senate Report No. 1487 proposed the inclusion of equivalent language in an amended section 8(s). However, the Senate-House Conference Committee rejected the Senate's proposed amendment. 1966 Cong. Rec. 22651 (daily ed. Sept. 14, 1966). The Congressional treatment of the issue fortifies our conclusion that the relationship between building employees and management agents should be determined in accordance with the customary principles obtaining under the Act.

We conclude that the stipulated issue must be answered in the affirmative.

ISSUE

"In determining 'annual gross volume of sales made or business done' by the defendant within the meaning of Section 3(s) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?" [Stip. ¶ 6]

According to the Stipulation, the annual gross rental income collected by defendant from the managed buildings exceeded $1,000,000 per annum. [Stip. ¶ 206] Defendant's commissions on these rentals approximated or exceeded $200,000 in 1964 and 1965, and $250,000 in 1966 and thereafter. [Stip. ¶ 207] Commissions have never exceeded $500,000 per annum. [Ibid]

The Fair Labor Standards Amendments of 1961, *supra*, established as one condition to "enterprise" coverage an "annual gross volume of sales of such enterprise . . . not less than $1,000,000." 29 U.S.C. § 203(s)(3) (1958 Ed. Supp. V). The Fair Labor Standards Amendments of 1966, *supra*, require for the period February 1, 1967, through January 31, 1969, a minimum "annual gross volume of sales" of $500,000 and thereafter of $250,000. 29 U.S.C. § 203 (s)(1) (1964 Ed. Supp. II).

Defendant contends that only its commissions of rentals should be included in determining its "annual gross volume of sales." In this instance, the statutory requirement for coverage would not have been satisfied until February 1, 1969. The Government

argued that the computation of defendant's "annual gross volume of sales" requires inclusion of all rentals collected by defendant.

The Senate Report on the 1961 Amendments expressed the underlying philosophy of the provision and asserted:

> "The million dollar test is *an economic test*. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating *a business of that size* in commerce can afford to pay his employees the minimum wage under this law." S. Rep., No. 145, 87th Cong., 1st Sess., U.S. Code Cong. & Adm. News 1961, p. 1624. Quoted in *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, 362 F. 2d 857, 862 (5 Cir. 1966); *Wirtz* v. *Columbian Mutual Life Ins. Co.*, *supra*, 246 F. Supp. 202; *Wirtz* v. *First National Bank and Trust Co.*, 365 F. 2d 641, 645n (10 Cir. 1966).

Defendant relies on two District Court opinions, *Schmidt* v. *Randall*, 160 F. Supp. 228 (D. Minn. 1958), and *Mitchell* v. *Carrell*, 160 F. Supp. 261 (S.D. Fla. 1956), wherein the plaintiffs' attempt to include the gross receipts of the defendants' sale of bus tickets were rejected in favor of computing only the defendants' commissions on the sales.

On the other hand, in *Wirtz* v. *Jernigan*, 405 F. 2d 106 (5 Cir. 1968), at issue was the computation of the defendant's sale of bus tickets as an agent of Greyhound Corporation. Including the gross receipts rather than the defendant's commissions, the Court speaking through Judge McEntee of the First Circuit, asserted:

". . . The district court reason
is not merely including his prof
pay certain expenses out of t
This is strictly true but nothing
It is equally true that the rest
over and above the price of the f
their reduced by overhead such s
ries. But if the fact that the co
represent pure profit leads to the
only the commissions should be c
termining qualification for the
the cost of food in the restaura
excluded on the same basis. Yet
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proceeds and profits are not the s
F. 2d 159.

that defendant
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me thing." 405

In *Wirtz* v. *First National Bank* supra, the landlord's wholly-owned
ceived a "management fee" of $30,00
gross earnings from rentals of over $
Court of Appeals for the Tenth Circu
gross rentals in determining the sub
volume of sales." 365 F. 2d 644, 645
Columbian Mutual Insurance Co., sup

nd Trust Co.,
subsidiary re-
per annum on
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computed the
idiary's gross
Cf. *Wirtz* v.
a.

We believe the *Jernigan* case *supra*
better view and the correct applicati
legislative intent. Accordingly, we con
rentals from defendant's management
be included in determining its "annu
of sales made or business done."

represents the
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ctivities must
gross volume

Issue

"Are the business activities
. . . particularly those related t

[defendant]
the manage-

ment of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the . . . Act . . .?" [Stip. ¶ 1]

Section 3(r), as added to the Act by the 1961 Amendments, *supra*, defined as follows:

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . ." 29 U.S.C. § 203(r) (1958 Ed. Supp. V).

The statutory defintion of enterprise requires the existence of three elements: (1) related activities, (2) unified operation or common control, and (3) a common business purpose. *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, *supra*, 362 F. 2d 859.

As stated in the Regulations:

> ". . . the answer to the question whether particular activities are 'related' or not, will depend in each case upon whether the activities serve the business purpose of the enterprise, or whether they serve a separate and unrelated business." 29 C.F.R. § 779.206(b).

Defendant's relevant business includes the management of buildings. [Stip. ¶ 204] Its "Contract for Management" mandates it "[t]o hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. . . ." [Stip. Exh. 1, p. 2] The activities of such laborers are related to defendant's business.

Paragraph 303 of the Stipulation, quoted *supra* at page 3 et seq, establishes defendant's "common control." Cf. 29 C.F.R. § 779.221. Likewise, the activities of the employees in each building serve a "common business purpose." Cf. 29 C.F.R. § 779.213.

Defendant challenges treating the various buildings as "establishments" of defendant. It argues:

> "[Plaintiff] has ignored the absolute necessity of establishing each of these various buildings as 'establishments' of the 'enterprise' of [defendant]. Nothing in the Stipulation or in the facts suggest [sic] that [defendant] maintains a distinct place of business anywhere else except at the Grant Building." [Defendant's Brief, p. 10]

The Act does not define the term "establishment." However, the term has been judicially construed to mean "a distinct physical place of business." *Phillips Co. v. Walling*, 324 U.S. 490, 496, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876 (1945). Accord: 29 C.F.R. § 779.23. This construction was not modified by more recent amendments to the Act. *Wirtz v. Savannah Bank and Trust Co. of Savannah*, *supra*, 362 F. 2d 363.

By its contract with the various buildings, defendant is in the "business" of managing the buildings' janitorial services. Necessarily these must be per-

formed in the building. Therefore, each building becomes one of defendant's "places of business."

Defendant argues:

> "... if the buildings themselves are to be considered part of [defendant's] 'enterprise', then how can the government avoid including the building owners as part of that enterprise? But to try to do so would have been ludicrous, for it is apparent ... that these various owners of the buildings are not acting together with each other and [defendant] for a 'common business purpose'. It is even possible that one owner does not know which other buildings [defendant] are [sic] managing for others." [Defendant's Brief, p. 10]

The flaw in this analysis is the correlation of "enterprise" to "buildings"; whereas the statutory definition defines "enterprise" as "related activities." 29 U.S.C. § 203r) (1958 Ed. Supp. V). Moreover, as the Regulations assert: "... the term 'enterprise' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide." 29 C.F.R. § 779.203(b).

We are confronted here with a situation analogous to the case of a chain's store in a supermarket. Treating the entire supermarket as the owner's "establishment" does not preclude treating the particular store as one of the chain's "establishments" and the activities conducted in that "establishment" as part of the chain's "enterprise." Cf. 29 C.F.R. § 779.225.

ISSUE

"Among the persons ... employed at the various buildings managed by the defendant, are

there at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?" [Stip. ¶ 4]

The Stipulation refers to the activities of various employees in each building. [Stip. ¶ 501] These activities may be categorized as follows: 1) operating elevators carrying mailmen delivering mail and parcel post and carrying delivery men making deliveries, a "portion" of which originate outside Pennsylvania; 2) operating elevators carrying freight to and from the building, a "portion" of which involved interstate shipments; and 3) using in connection with maintenance work "goods . . . including such goods as soap, detergent, waxes, and light bulbs," originating outside Pennsylvania. [Stip. ¶¶ 501, 502]

In determining the coverage of elevator operators in office buildings, absent evidence that tenants are themselves engaged in producing goods for interstate commerce, the mere fact that elevator operators convey mailmen and deliverymen carrying items in interstate commerce does not suffice to bring the elevator operators within the coverage of the Act. *10 East 40th Street Building, Inc. v. Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, 161 A.L.R. 1263 (1945).[1]

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[1] Plaintiff relies on *Wirtz v. Columbian Mutual Life Ins. Co.*, *supra*, as authority for treating the employees in the case at bar as engaged in interstate commerce. In the *Columbian* case, the Secretary sought coverage for elevator operators and building porters. The Court sustained coverage of

With reference to the janitors' use of "soap, detergent, waxes, and light bulbs" which have moved in interstate commerce, two features are important:

1) The term "goods," as defined in Section 3(i) of the Act, ". . . does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i).

2) As stated in 29 C.F.R. § 779.240(a):

"... the mere fact that employees ... are using machinery, equipment, work tools, and the like, which may have been moved in or produced for commerce, does not mean that they are handling, selling, or otherwise working on 'goods' that have been moved in or produced for commerce within the meaning of Section 3(s)."

We conclude that there have not been two employees in each building engaging in interstate commerce.

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these employees under the "enterprise" doctrine on the basis of the porters' activities, described as follows:

"... The building does not have a freight elevator so that freight and express shipments are lowered into the basement during the day by a sidewalk lift operated by porters, signed for by them, and then at night these shipments are carried by porters, on the passenger elevators, to the offices of the tenants. A substantial part of these shipments have moved in interstate commerce." 246 F. Supp. 208.

In the case at bar, only employees at the Bold Building "personally" handle the delivery of parcels. [Stip. ¶ 501] Elsewhere, they merely operate elevators carrying deliverymen. [Id] Moreover, the Stipulation does not establish that a "substantial part" of these parcels had originated outside Pennsylvania. The Columbian case is inapposite.

Issue

"Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?" [Stip. ¶ 7]

We have heretofore concluded that the activities of the employees in question constituted part of the "enterprise" of defendant within the meaning of Section 3(r). Section 3(s), as supplied by the 1961 Amendments, *supra*, provided:

"'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

* * * *

"(3) any establishment of any such enterprise . . . which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000." 29 U.S.C. § 203(s) (1958 Ed. Supp. V).

We have heretofore concluded that the "annual gross volume of sales" of defendant's enterprise requires a computation of the gross rental receipts for the various buildings. However, we have also heretofore concluded that at none of the buildings did defendant have two or more employees engaged in commerce or in the production of goods for com-

merce." None of the employees were covered under the 1961 Amendments to the Act.

Issue

"Does [defendant] employ anywhere two or more persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?" [Stip. ¶ 5]

The Stipulation asserts:

". . . a number of [defendant's] employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania." [Stip. ¶ 21]

Section 3(b) of the Act defines "commerce" to include ". . . communication among the several States or between any State and any other place outside thereof." 29 U.S.C. § 203(b). Employees engaged in these activities are engaged in interstate commerce. *Mitchell v. Joyce Agency, Inc.*, 348 U.S. 945, 75 S.

...96, 99 L. Ed. 740 (1955), rev'g 211 F. 2d 241 (7 Cir. 1954), rev'g in part 110 F. Supp. 918 (N.D. Ill. 1953); *Mitchell v. Kroger Co.*, 248 F. 2d 935 (8 Cir. 1957).

We conclude that defendant employs two or more persons performing activities which constitute engagement in interstate commerce.

ISSUE

"After February 1, 1967, was defendant's business an enterprise as defined in Section 3(r) and 3(s)(1) of the Act as amended?" [Stip. ¶ 8]

We have heretofore determined that defendant's operations constituted an ["establishment"] within the meaning of Section 3(r) of the Act, as amended in 1961. The 1966 Amendments, *supra*, note 6, made no relevant alteration in the language of Section 3(r). Therefore, defendant's relevant activities have also constituted an "enterprise" since February 1, 1967.

The 1966 Amendments, *supra*, adopted a new Section 3(s), which provides:

"'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales

made or business done is not less than $500,000 . . . and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . . ." 29 U.S.C. § 203(s) (1964 Ed. Supp. II).

It is not disputed that defendant's enterprise "has employees engaged in commerce." Based on a prior conclusion, it is likewise clear that defendant's "annual gross volume of sales made or business done" exceeds the statutory minimums.

We conclude that after February 1, 1967, defendant's business constituted an "enterprise" within the meaning of the Act.

Issue

"If there is liability under the Act to any of the employees of any of the buildings managed but not owned by [defendant], is it the liability of the defendant or is it the liability of the owner of the buildings?" [Stip. ¶ 3]

Section 6 of the Act imposes liability for payment of the minimum wage and overtime pay on the "employer." 29 U.S.C. §§ 206, 207. We have heretofore noted that defendant is the "employer" within the meaning of the Act; and thus its liability is clear. None of the building owners are parties to this action. Accordingly, any observation we might make regarding their own potential liability would not be dispositive of an issue not properly within the ambit of the

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* The bracketed words was subsequently struck by the court and the word "enterprise" was substituted.

instant action. Cf. *Annetts v. 149 Madison Ave. Corp.*, 65 F. Supp. 385 (S.D. N.Y. 1945), aff'd 156 F. 2d 239 (2 Cir. 1946), aff'd 331 U.S. 199, 67 S. Ct. 1178, 91 L. Ed. 1432, 169 A.L.R. 1293 (1947), modified on other grounds 331 U.S. 795, 67 S. Ct. 1726, 91 L. Ed. 1822 (1947).

Opinion

ORDER OF COURT

AND NOW, to-wit, this 30 day of September, 1969, it is hereby ORDERED and DIRECTED that counsel for the plaintiff submit, after notice to counsel for the defendant and for the intervener, within twenty (20) days, a proposed form of order for final judgment in accordance with the foregoing Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER AMENDING OPINION

And Now, to-wit, this 6 day of October, 1969, the Opinion filed herein on September 29, 1969, is hereby amended by striking the words "merely repealed" as they appear in the third sentence of the third paragraph on page six, and substituting therefor the words "changed the basis of".

The Opinion is also amended by substituting the word "enterprise" for the word "establishment" in the first sentence of the first paragraph on page eighteen of the said Opinion.

JOHN L. MILLER
United States District Judge.

Order

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[Caption Omitted]

ORDER

This cause was heard on motion of the plaintiff for summary judgment and on cross motions of the defendant Arnheim and Neely, Inc., and defendant intervenor The Institute of Real Estate Management of the National Association of Real Estate Boards for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings herein and the comprehensive stipulations of facts of the parties, and having heard the argument of counsel, and after due deliberation a written opinion having been duly entered, it is

ORDERED that defendant and defendant intervenor's cross motion for summary judgment be and hereby is gratned with respect to wage payments made prior to February 1, 1967 in conformity with the opinion of this Court entered herein, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is granted with respect to wage payments made after February 1, 1967 in conformity with the opinion of the Court entered herein, that the defendant constitutes an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of Section 3(s)(1) under the 1966 amendments to the Fair Labor Standards Act (80 Stat. 830), and not within the meaning of Section 3(s)(3) under the 1961 amendments to the Fair Labor Standards Act (75 Stat. 65), and it is

FURTHER ORDERED that, in the exercise of the Court's discretion, no injunction will be entered regarding future violations of the Act.

December 17, 1969.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that Arnheim and Neely, Inc., Defendant above named, and The Institute of Real Estate Management of The National Association of Real Estate Boards, Intervenor above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 17th day of December, 1969.

[Filed Feb. 11, 1970]

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Strassburger & McKenna,

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Attorneys for Intervenor,
The Institute of Real
Estate Management

[Caption Omitted]

NOTICE OF APPEAL

TO THE COURT OF APPEALS FROM A JUDGMENT OR ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA:

Notice is hereby given that George P. Shultz, Secretary of Labor, United States Department of Labor, plaintiff above named, appeals to the United States Court of Appeals for the Third Circuit from so much of the judgment entered in this action on December 17, 1969, as disallows the plaintiff's claim that the defendant was an enterprise within the meaning of Section 3(s)(3) as per the 1961 Amendments to the Fair Labor Standards Act of 1938, (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), (75 Stat. 65), and the denial of ensuant back wages and the refusal of the trial court to order an injunction as against further violations of the Act.

★ U. S. GOVERNMENT PRINTING OFFICE: 1970

SUPREME COURT OF THE UNITED STATES

No. 71-1598,

James D. Hodgson, Secretary of Labor,
Petitioner,

v.

Arnheim and Neely, Inc., et al.

ORDER ALLOWING CERTIORARI. Filed October 10, 1972.

The petition herein for a writ of certiorari to the United State Court of Appeals for the Third Circuit is granted.

☆ U.S. Government Printing Office: 1972—488-231/39